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Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

October Term, 1996

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

I. Was the municipal council's planned invasion, seizure, and physical destruction of Antonino's residential building a deprivation of his civil and constitutional rights under the Fourth, Fifth, and Fourteenth Amendments?

II. In our society, is the complete demolition of property for a municipal zoning offense a "cruel and unusual" punishment under the Eighth Amendment?

III. When petitioners' federal suit for an injunction against the threatened full demolition of their $350,000 building was timely filed and a federal judge at the outset ruled "I will not stand in their way," and complete demolition took place, did the federal judiciary fail to enforce the Fourth and Fifth Amendments to the Bill of Rights when they dismissed petitioners' suit for a remedy in damages?

PARTIES

The petitioners for this Court's review on certiorari are Antonino Maceri, a young homebuilder, whose $350,000 two-family building at 409 Nelson Avenue, Cliffside Park, New Jersey, was seized and totally destroyed by the municipal defendants (under color of state and municipal zoning law). His one-person New Jersey building corporation, Antonino Enterprises, Inc., prior to a mortgage foreclosure that took place in the wake of demolition of the building, held title to the lot and to the project and was, therefore, a necessary party to Antonino's complaint, filed in the Federal District Court in Newark. The complaint was filed August 24, 1993, in an unsuccessful effort to enjoin the demolition and for damages for its seizure and destruction. Upon dismissal of the complaint in the Federal

District Court, Antonino individually and his building corporation were appellants in the United States Court of Appeals for the Third Circuit.

Defendants to the action included the Borough of Cliffside Park in its corporate capacity; a municipal engineer, Stephen T. Boswell, who was drafting specifications for public bids to be taken for a total demolition; Brian T. McGuirt, the borough clerk, who was officially charged with receiving the bids from demolition contractors; Robert Cimmino, the municipal building official, who, unlike his predecessor,[1] was about to issue the

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[1] Frank Pollotta, Cliffside Park's former building official, had issued a building permit for Antonino's two-family house and had testified in an earlier state zoning action that the zoning problems that developed for the builder under a new zoning amendment could be remedied by a partial demolition at a cost of $15,000-$20,000. When the municipal board of zoning appeals denied reinstatement of Antonino's building permit, Pollotta resigned, and Cimmino

municipal order for a full demolition.

The municipal defendants also included Gerald A. Calabrese, the municipality's long-time, entrenched Mayor, who also was leader of the Democratic Party in Bergen County as County Chairman when his administration gave its order to demolish plaintiff's house. Other defendants were Christos J. Diktas, Esq., and his law firm. Diktas was not Cliffside Park's borough attorney but was alleged to be Mayor Calabrese's handpicked attorney in matters relating to

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became the borough's construction official. Antonino anticipated calling Pollotta as a witness at the trial to testify that a total demolition was unreasonable and unnecessarily destructive, other less burdensome measures for achieving zoning conformity being available; i.e., limiting use of the building to one-family, dismantling a front window balcony to meet the upgraded ground coverage requirement of the new ordinance, and partial demolition of the rearmost 5' of the building to conform to the new rear yard minimum.

Antonino's project.

In addition to the municipal parties, Calabrese Realty, a real estate brokerage firm owned by the Mayor's son and brother, was a defendant. Antonino intended to prove that, unlike other builders, he had rejected another official's "friendly advice" that he give the listings for the project to the realty firm run by the Mayor's relatives; he claimed that the full demolition order was a cruel and deliberate punishment ordered solely for his project, not at all for zoning reasons but because he had refused to "play ball" with Calabrese Realty.

Thomas Tormey was a Cliffside Park resident who Antonino claimed had been used by the Mayor as a citizen objector to give a semblance of validity to the municipal government's seizure and destruction of the property for zoning

reasons.

Demolition bids not having been opened when the complaint was filed in August, 1993, the fictitious John Doe defendants were named so that a temporary injunction would bind and apply to the unknown successful bidder for the municipal demolition contract.

Defendant Gerald A. Calabrese, Jr., the Mayor's son, was a principal in Calabrese Realty, but nonetheless, in his capacity as an appointed county tax commissioner, had signed a judgment in a related state tax appeal denying a property tax reduction to Antonino, despite revocation of Antonino's building permit and despite the manifest conflict of interest arising from Calabrese Realty's dispute with Antonino. The failure to accept recusal as a tax commissioner in a case where so clear a

conflict existed evidenced defendants' willingness to abuse their official power at every level of government in the effort to destroy Antonino. Without this Court's Writ reversing for trial, they succeed.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. ***Fourth Amendment:***
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

2. ***Fifth Amendment:***
"[N]or shall any person . . .be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. ***Eighth Amendment:***
". . . cruel and unusual punishments [shall not be] inflicted."

4. ***Fourteenth Amendment:***
"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. ***Civil Rights Act of 1866, 42 U.S.C., §1982:***
"All citizens of the United States shall have the same right, in every State and Territory, . . . to. . . sell, hold, and convey real and personal property."

6. ***42 U.S.C., §1983:***
"Every person who, under color of any statute, ordinance, regulation. . . of any

State. . .subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Antonino Maceri and Antonino Enterprises, Inc., respectfully pray that

a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 5, 1996.

OPINION BELOW

Opinion of the United States Court of Appeals for the Third Circuit (No. 95-5224)(July 5, 1996) unpublished (4A). Antonino's petition for rehearing was denied by the Court of Appeals by Order of August 8, 1996, a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc. (11A).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 5, 1996. The petition for rehearing was denied by Order dated August 8, 1996. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28

U.S.C.,§1254(1).

STATEMENT OF THE CASE

It is the special province of the federal courts to enforce the Bill of Rights. Our whole constitutional government, with limited rights granted to the states and federal remedies guaranteed to restrain the lawless acts of local officials, becomes formless and meaningless if the federal judiciary will not enforce the Constitution. This is a clear case in which the federal courts, over which this Court sits in supervisory review, have failed to do so.

Antonino's complaint, filed August 24, 1993, seeking an injunction against the cruel and revengeful destruction of his two-family edifice, built at a cost of $350,000, was dismissed. On motion for a preliminary restraining order, to remain

in effect pendente lite until the proofs were heard (Antonino prayed for a trial by jury), the federal district court ruled:

> "There will be no injunctive relief. The municipality is free to do what it wishes. But I would urge both of you to try to resolve the matter in what I am informed by counsel is a relatively reasonable cost-effective manner, namely, bring the building into compliance, but that is if the municipality wants to tear it down tomorrow, I will not stand in their way."
>
> "Nothing has been presented which indicates that I should stand in their way. . . . .You are aware that the Court of Appeals has judges here in this area, and any application for a stay should be addressed. . .to any Court of Appeals judge that you wish to address it to."

On an interlocutory application to the Court of Appeals, a Circuit Judge ruled that, Antonino having engaged in the project for commercial reasons, his lost profits would be compensable in damages. The remedy in damages being adequate, an injunction against a total destruction of the property was denied in the Court of

Appeals as well.

Unrestrained, Mayor Calabrese and the Cliffside Park Council let the demolition contract, and the municipal seizure and destruction of Antonino's building followed in short order, virtually bankrupting him. His mortgagee swiftly foreclosed, and the $350,000 poured into the project was lost.

Cliffside Park's motion for dismissal of the case even for a remedy in damages was granted, and the Court of Appeals affirmed.

This case thus raises vital issues of federal constitutional and statutory law. The record is not cloudy. No narrow, technical matters remain to be illumined. The lower federal courts have permitted municipal contractors physically to destroy plaintiffs' $350,000 house and, following demolition, have left the owner

without even a day in court, much less a remedy in damages for the taking. The fundamental guarantees of the Fourth, Fifth, and Eighth Amendments, to this plaintiff, are utterly without meaning.

The court of appeals "moved by the tragedy that has befallen" plaintiffs, would have us accept the result on the theory that the federal judiciary may enforce the Constitution only when there is a "clean slate."[2] The denial of constitutional protection was said to stem from technical defenses asserted by the municipality resulting from res judicata and prior state zoning litigation. But the extensive zoning litigation that had taken place in the state courts had not touched on the

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[2]"Unfortunately for plaintiffs, we do not write on a clean slate." Memorandum Opinion, at 4A.

central issue raised here--the constitutionality of a municipal council's total demolition of a citizen's property when other less burdensome measures--a $15,000 reconfiguration of the interior--would have cured any zoning shortage.

In contrast to the Third Circuit's finding that the central issue was barred by res judicata, Hon. John C. Lifland, in vacating sanctions against both plaintiffs and against plaintiffs' counsel and in denying defendants' motions for an alleged violation of Rule 11, found that the issue of zoning enforcement by total vs. partial demolition of the structure was not an issue previously considered or decided by the state courts, and that plaintiffs were not to be sanctioned for having sought to prevent an unconstitutional and excessive total demolition when other less drastic zoning enforcement steps were available.

If it was true, as alleged, that plaintiffs' house was blasted away by the municipality because Antonino had refused to give listings or "play ball" with a real estate agency in which the Mayor of Cliffside Park had an interest, we deal here with a punitive, intentional seizure and destruction of a citizen's property. The Fourth Amendment's guarantee of security to the people "in their persons, houses, papers, and effects, against unreasonable searches and seizures," plainly forbids the excessive and unnecessary governmental infliction of punishment and harm. The municipal agents and employees responsible for the demolition had to have been appalled to be involved in so injurious a public act; if this Court reverses the dismissal of plaintiffs' complaint, many of them will testify at the trial.

Their destruction of the plaintiffs' home had not been ordered to protect or promote the public health, safety, or morals. The demolition order rather was justified as needed to carry out a zone plan--the council's vague, new policy against two-family homes, applied only against Antonino despite the hundreds of other similar buildings constructed in densely populated Cliffside Park.

As to the necessity or reasonableness of a total demolition, there was no taking for a governmental or public use under eminent domain. None of the other two-family homes near or adjoining plaintiffs' lot at 409 Nelson Avenue was slated to be demolished. No new street, school, or park was proposed for the Nelson Avenue lot, and everyone in the Borough knew that, at the very same time that plaintiffs' two-family home was being

demolished, other building permits for new two-family homes, similar to that of the plaintiff and indeed much larger, were being granted.

It was not necessary to achieve zoning conformity for plaintiffs' home to be totally demolished. For a period of 59 years, from 1930 to 1989, Cliffside Park's built-up character had been settled; the property at 409 Nelson Avenue was centered in a two-family zone district, the R-2 district. The character of the zone did not change to a neighborhood of one-family homes upon the total demolition and removal of Antonino's structure.

Antonino's residence had been built under a two-family building permit issued on October 2, 1989. That is, his two-family plans had been submitted to and approved by Cliffside's officials, including rulings that the electrical,

plumbing, and all other detailed plans complied with all applicable building codes and requirements. The municipality changed its position with an amended zoning ordinance, Ord. #17-89, restricting his immediate area to one-family homes, adopted at or about the time that Antonino was submitting his plans for approval to the building department, but an ordinance that did not become effective as to any other builder or property owner in the borough until its filing with the county planning board on October 25, 1989. Plaintiffs stressed below that the ordinance had been adopted 59 years after the fact--after the character of the entire westerly section of Cliffside Park had been established with a mixture of one-family, two-family and multi-family properties, and that its effective date under state law (N.J.S.A. 40:55D-16) was

after his October 2 building permit.

Still, Antonino did not seek to relitigate in the federal court any issue that had been considered and decided against him in the state courts. He rather argued in the District Court:

> "However unfair and unjust the ordinance itself may be, Antonino may no longer say that Ordinance 17-89 is an invalid land use regulation because of any technical or other defects in the process of its enactment and adoption by the council in August, 1989. . . .In this case, there is much merit to the plaintiffs' legal position--the Planning Board public hearing on the new land use plan did not occur until May 10, 1990, more than 8 months after plaintiff's building permit had been issued. The state courts have nonetheless upheld Cliffside Park in this regard, and it, therefore, must be accepted for present purposes that Ordinance 17-89 is a fact of life and that it has general validity throughout the municipality." (Plaintiffs' brief in support of motion for preliminary restraint against demolition of premises, at p.3)

Antonino's federal complaint was filed August 24, 1993, not to relitigate

the issues decided in the state courts but principally because Antonino had received a July 21, 1993 letter from the Construction Official mentioning removal of the entire structure (Exh.1 annexed to plaintiffs' federal complaint) and because the municipality had published a public notice, captioned as "Advertisement for Bids" on August 17, 1993, stating:

> "DEMOLITION OF BUILDING
> 409 NELSON AVENUE
> The work to be performed under this contract includes demolition and removal of a three-story stone structure house approximately 38' x 54' of frame construction and concrete block foundation."

One week earlier, at a Council meeting held August 10, 1993, Mayor Calabrese had signed a resolution awarding an engineering contract and stating in its preamble:

> "WHEREAS, there exists in the Borough of Cliffside Park a need for the

services of a civil engineering firm to prepare specifications for the Demolition of Building at 409 Nelson Ave."

Plaintiffs' federal complaint was an attempt to stop the municipality's plan to award a contract for a full demolition to the lowest bidder. Paragraph 1 stated:

"Plaintiffs seek injunctive relief against demolition of their premises and damages in excess of $350,000."

Paragraphs 11 and 12 of the complaint alleged:

"11. Defendant, Brian T. McGuirt, is the Borough Clerk of the Borough of Cliffside Park. Unless enjoined from doing so by this Court, he has publicly advertised that he intends to open and read bids for the doing of the demolition work now being submitted by demolition contractors."

12. Defendant, John Doe, is a fictitious name to include any demolition contractor whose bid is accepted by the Borough and any other persons participating in the conspiracy to injure and demolish plaintiff's property; the actual identity of this defendant is not now known."

Res judicata, of course, turns on

whether a prior judgment was rendered on the merits of a claim that had in fact been previously litigated. Here, it is simply not correct to say that there had been a "full and ample opportunity to adduce" the proofs in the state courts to prove plaintiffs' federal claims. If demolition of the property had not even been mentioned in the first case, much less ordered by any state court, as Judge Lifland expressly found in the Federal District Court, there was no basis for the Court of Appeals to refuse to enforce plaintiffs' Fourth and Fifth Amendment rights. In point of fact, the constitutional issues were not "foreclosed in federal court by the doctrine of res judicata." In brief, the lower court opinions contradict each other:

(a) The Third Circuit panel held that "plaintiffs assert precisely the same

constitutional issues as those raised in the state litigation."

(b) Judge Lifland, in vacating sanctions in the district court, found:

> "I am satisfied that demolition as a remedy was not previously addressed by anybody."

We respectfully submit that, without the testimony of witnesses and proofs, neither of the opinions below can withstand analysis. If Antonino's property was destroyed because he refused "to play ball" with Calabrese Realty, as he maintains and as he stands ready to prove to a federal jury, this petitioner's constitutional and civil rights were unquestionably violated; this Court's writ of certiorari should issue, together with a summary order reversing the grant of defendants' dismissal motions and remanding for trial. Above all, the federal judiciary must stand ready to

enforce the Bill of Rights.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW REFUSED TO ENFORCE THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IGNORED DECISIONS OF THIS COURT REQUIRING THAT FINAL STATE ACTION BE CONSISTENT WITH THE BILL OF RIGHTS.

The lower federal courts, recognizing the injury, indeed "the tragedy," shown here, nonetheless failed to apply the protection against the physical destruction of private property prohibited by the Fourth and Fifth Amendments. In so ruling, the lower courts lost sight of Mr. Justice Harlan's Opinion in Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234-35 (1897):

> "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the

fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. . . . Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law says, 'is that of enjoying private property without undue interference or molestation.' The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.'. . .

[I]t must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation."

This Court has frequently encountered

claims by government agencies of a right to inflict damages on private property without being answerable for a one-time physical invasion. This Court has rejected such claims where the property has been left with total destruction. In Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. 166, 20 L.Ed. 557 (1872), the building of a dam had so raised the nearby waters as to overflow and totally destroy 640 acres of the plaintiff's land. In an Opinion by Mr. Justice Miller, this Court held that the momentary character of the physical invasion did not make it any the less a compensable taking, saying:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on the subject beyond the power of ordinary

> legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." 20 L. Ed., at 560.

This is no more than to say that there are limits to the amount of destruction or impairment of the enjoyment or value of private property which public authorities may accomplish without the necessity of paying compensation therefor.

In Pumpelly, the Court dealt with the physical destruction of property as an uncompensated taking, reversed the

contrary judgment of the circuit court, and remanded to that court for further proceedings not inconsistent with its Opinion. See Backus v. Fourth Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

In zoning measures as well, this Court, in sustaining a City of Boston height restriction, insisted that exercises of "so-called police power" must have a "real, substantial relation to a public object which government can accomplish," ruling:

> ". . .If the statutes are arbitrary and unreasonable and beyond the necessities of the case, the court will declare their invalidity." Welch v. Swasey, 214 U.S. 91, 53 L. Ed. 923, 929 (1909); emphasis added.

So, too, here, the full destruction of Antonino's property plainly went "beyond the necessities of the case," inflicting a loss of $350,000 on the owner when any legitimate police power objective would have been served with a $15,000 partial

reconfiguration of Antonino's building.

II. THE DECISIONS BELOW FAIL TO GRANT THE FEDERAL REMEDY, 42 U.S.C., §1983, SPECIFICALLY INTENDED BY CONGRESS TO ENFORCE THE PROVISIONS OF THE FOURTEENTH AMENDMENT AGAINST FINAL STATE ACTION.

The Civil Rights Act of 1871, 42 U.S.C., §1983, expressly precludes "the deprivation of any rights, privileges or immunities secured by the Constitution" by any person acting "under color of any statute, ordinance, regulation, or other state law"; it provides that any such local agents "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The purposes of §1983 were articulated by this Court in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.ed. 2d 492 (1961). There, as here, a federal district court

had dismissed a civil rights complaint as stating no cause of action, and the court of appeals affirmed. On certiorari, this Court reversed insofar as it held that the complaint stated a valid cause of action against the defendant police officers. The invasion of the petitioners' home had amounted to a search without a warrant. This Court stated:

> "The question with which we now deal is the narrower one of whether Congress, in enacting Section 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position . . . .We conclude that it did so intend." 5 L.ed. 2d, at 497.

In Mr. Justice Douglas' Opinion, the Court stated:

> "The *third* aim was to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice." Id., at 498
>
> ". . .The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right

> in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Id., at 501.

In the light of Congress' intent to provide a federal remedy to deal with abuse of power by local officials, it is impossible to reconcile the dismissal of Antonino's complaint in this case with the philosophy expressed by this Court in Monroe v. Pape.

The lower courts' dismissal here disregards a settled line of cases holding that the government may not destroy private property except for a public purpose, and then only by compensating for the taking. See, e.g., United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). See, especially, Mr. Justice Rehnquist's dissent in Penn

Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978). By a landmarks designation, Penn Central was limited in the exercise of its development rights to build above its Grand Central terminal. This Court's majority found that all use of the air rights had not been destroyed in that some portion of the airspace above the terminal remained buildable and, in any event, the same development rights, although restricted at the site of the Terminal, were transferable to at least eight parcels in the vicinity. In dissenting, Mr. Justice Rehnquist wrote:

> "Appellees [have] destroyed--in a literal sense, 'taken'--substantial property rights of Penn Central. . . .But an examination of the two exceptions where the destruction of property does not constitute a taking demonstrates that a compensable taking has occurred here. . . .Here, however, a multimillion dollar loss has been imposed on appellants. . . .It is exactly this imposition of general costs on a few individuals at

> which the 'taking' protection is [directed]. . . .But it is precisely this sort of discrimination that the Fifth Amendment prohibits. . . .The Court has frequently held that. . .a destruction of property rights. . . requires compensation under the Fifth Amendment. . . .[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

III. COMPLETE DESTRUCTION OF PRIVATE PROPERTY IS A "CRUEL AND UNUSUAL" PUNISHMENT FOR A MUNICIPAL ZONING VIOLATION IN VIOLATION OF THE EIGHTH AMENDMENT.

In other societies, even to this day, it may be permissible for government agents to bomb, wreck, or blast away an offender's home. In the United States, however, demolition of property as a form of punishment is unthinkable.

The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted. In Wilkerson v. Utah, 99 U.S. 130, 135 (1879), this Court observed that:

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted, but it is safe to affirm that punishments. . .in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution."

Recently, in Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L. ed. 2d 630 (1958), Chief Justice Warren, in a case dealing with the deprivation of citizenship upon conviction by court martial for desertion, noted that "the exact scope of the constitutional phrase 'cruel and unusual' had not been detailed by this Court." 2 L. ed. 2d, at 642.

> ". . .The words of the Amendment are not precise, and. . .their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. We believe. . .that use of denationalization as a punishment is barred by the 8th Amendment."

> ". . .This punishment is offensive to cardinal principles for which the Constitution stands. . . .[T]he task of resolving [the issue of

> constitutionality]. . .is inescapably ours. . . .We are oath-bound to defend the Constitution. . . .If we do not, the words of the Constitution become little more than good advice. . . .We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication." Id., at 644.

In a footnote, the Court noted that the word "unusual" has a meaning apart from the word "cruel," noting that "the meaning should be the ordinary one, signifying something different from that which is generally done."

> "Denationalization as a punishment certainly meets this test. It was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day." Id., at 642, fn.32.

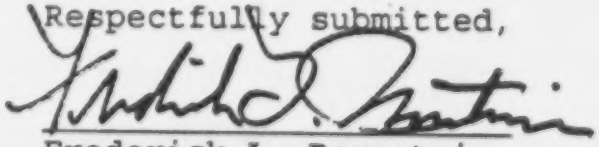
The same is the case here. This Court's writ of certiorari should issue to establish that the complete destruction of private property is a "cruel and unusual" punishment for a municipal zoning

violation under the Eighth Amendment.

CONCLUSION

Petitioners, for the reasons set forth herein, respectfully pray this Court to grant this petition for a writ of certiorari. Unless this petition is granted, Antonino has no other course of redress for the protection of his constitutional rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments. For these various reasons, this petition for certiorari should be granted, his dismissed complaint reinstated, and the matter remanded to the district court for trial and further proceedings not inconsistent with this Court's Opinion.

Respectfully submitted,



Frederick L. Bernstein
Frederick L. Bernstein, P.A.
90 Main Street
Hackensack, NJ 07601
201-343-2500

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1996, I filed the required copies of the Petition for Writ of Certiorari in the Clerk's Office, and have served the required copies of the Petitioners' Writ to:

Liebowitz & Liebowitz, Esqs.
Attorneys for Borough of Cliffside Park
15 Engle Street
Englewood, NJ 07631
(via regular mail)

Rogan & Faugno, Esqs.
Attorneys for Calabrese & Company Realty and Gerald A. Calabrese
125 State Street
Hackensack, NJ 07601
(via personal delivery)

Hack, Piro, O'Day, Merklinger, Wallace & McKenna, P.A.
Attorneys for Thomas Tormey
30 Columbia Turnpike
Florham Park, NJ 07932-0941
(via regular mail)

I further certify that the foregoing were the only attorneys appearing for defendants/respondents in the Third Circuit.

Frederick L. Bernstein
Frederick L. Bernstein, P.A.
Attorney for Petitioners
90 Main Street
Hackensack, NJ 07601

NO. _____

IN THE

Supreme Court of the United States

October Term, 1994

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI

Excerpts from Transcript of District Court Opinion at hearing on Temporary Restraint Against Full Demolition on September 27, 1993.

"There will be no injunctive relief. The municipality is free to do what it wishes.

But I would urge both of you to try to resolve the matter in what I am informed by counsel is a relatively reasonable cost-effective manner, namely, bring the building into compliance, but that is if the municipality wants to tear it down tomorrow, I will not stand in their way."

* * *

"Nothing has been presented which indicates that I should stand in their way. . . . .You are aware that the Court of Appeals has judges here in this area, and any application for a stay should be addressed. . .to any Court of Appeals judge that you wish to address it to."

Excerpts from Transcript of District Court Proceedings on May 8, 1995 (Vacating Rule 11 Sanctions for Alleged Duplicative Litigation)

"I don't know that he would admit to any duplication, but he says as to one important aspect of it, and the bottom line as far as his client is concerned, there was no duplication, i.e., don't tear down my building, do something else to me."

* * *

"THE COURT: Well if demolition violated his client's constitutional rights, then he is in the right court. There is no requirement of exhaustion in the state court on a Section 1983 claim."

* * *

"The complaint in this matter was no doubt triggered by the imminence of demolition and the complaint, in paragraph 28, refers to the imminence of demolition and irreparable harm about to be done by the defendants in carrying out their threat to demolish plaintiff's property, as well as by the denial of equal protection of the laws described above."

* * *

"No one has pointed me to anything in the Appellate Division decision that addresses the remedy available to the municipality to deal with the problem of the plaintiff's noncompliance with the ordinance.

So in effect, at least in part, plaintiff was raising the issue of that remedy sought by the municipality in the proceedings before me."

* * *

"I am satisfied that demolition as a remedy was not previously addressed by anybody."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5224, 95-5423, 95-5464

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Anthony Maceri, Antonino Enterprises, Inc. and Frederick L. Bernstein, Esq. P.A., a New Jersey professional service corporation (law firm), Appellants in No. 95-5224

Robert Cimmino, Construction Official, Borough of Cliffside Park, Brian R.McGuirt, Cliffside Park Borough Clerk, Stephen T. Boswell, Borough Engineer, Christos J. Diktas & Habeeb, a law partnership, Gerald A. Calabrese, individually and as mayor of Cliffside Park, Appellants in No. 95-5423

Thomas Tormey, Appellant in No. 95-5464

Appeal from the United States District Court for the District of New Jersey
D.C. Civil Action No. 93-cv-03803

Argued: June 5, 1996

Before: BECKER, MANSMANN, Circuit Judges, and SCHWARZER, District Judge***

(FILED JULY 5, 1996)

MEMORANDUM OPINION

BECKER, Circuit Judge.

Plaintiffs Anthony Maceri and Antonino Enterprises, Inc. appeal from an order of the district court dismissing their federal civil rights claims, brought pursuant to 42 U.S.C. §§1983 and 1985, for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). Plaintiffs claim that defendants, the Borough of Cliffside Park (New Jersey) and a number of Borough officials, infringed their constitutional rights by demolishing a property built by plaintiffs under a permit issued by the borough by later

***. Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

revoked. Plaintiffs allege that the defendants revoked their permit to build a two-family dwelling in an area where such dwellings not only abound, but where permits to build them are regularly granted to others. Plaintiffs maintain that defendants invidiously discriminated against them because plaintiffs refused to list their property for rental with a real estate agency in which the Mayor of Cliffside Park had an interest.

Unfortunately for plaintiffs, we do not write on a clean slate. This case was the subject of extensive litigation in the New Jersey state courts before it landed in federal court. While the federal claims did not form the centerpiece of the state litigation, they were fairly presented to the state courts. Plaintiffs' federal claims were contained in plaintiff Antonino Enterprises's state court

complaint and the state court resolved them adversely to plaintiffs. See, e.g., Antonino Enterprises, Inc. v. Cliffside Park Planning Bd., No. A-5166-90T5 (N.J. Super. Ct. App. Div. Oct. 28, 1992)("We have considered the other arguments raised by Antonino: [e.g.,]. . .that the Mayor influenced the Board's decision in denying the variance. . .thus constituting [sic] 42 U.S.C. Sec. 1983 claim of discrimination. . ., and find that each of these remaining issues is without merit. . . ."). Although at one point in the state proceedings, Judge Lucci, the trial judge, stated that he would not reach plaintiffs' federal claim "that day," this does not affect the disposition of this case. First, there is no indication that the plaintiffs were precluded from raising the federal claims on other days of the protracted state trial. Second, insofar

as plaintiffs were limited in presenting their federal claims in state court, plaintiffs concede that they agreed to such limitations in exchange for the trial judge's refusal to grant defendants' motion for adjournment. Plaintiffs cannot now complain about the results of their agreement. In view of this state court history, the plaintiffs' claims are, as Judge Lifland property concluded, foreclosed in federal court by the doctrine of res judicata and the New Jersey entire controversy doctrine.****

Plaintiffs have argued that these doctrines do not bar the federal action because the property had not yet been demolished during the state proceedings.

****We note that the latter doctrine is the most expansive version of claims preclusion with which we are familiar; it not only bars claims against parties to the prior action but also against those who might have been parties.

We are sympathetic to this claim, but unfortunately it is unavailing. While plaintiffs' federal court action sought new remedies based on the demolition, plaintiffs assert precisely the same constitutional issues as those raised in the state litigation. We have looked carefully at all of plaintiffs' claims, moved by the tragedy that has befallen them. We are constrained, however, by res judicata and the entire controversy doctrine. Accordingly, the order dismissing plaintiffs' complaint must be affirmed.

We have also considered defendants' cross appeal from the district court's order vacating the sanctions previously imposed upon plaintiffs and plaintiffs' counsel under Fed. R. Civ. P. 11. We conclude, however, that Judge Lifland did not abuse his discretion in so ruling and

hence that order will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5224, 95-5423, 95-5464

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

(D.C. Civil Action No. 93-cv-03803)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges, and SCHWARZER, District Judge.*

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

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*. As to panel rehearing only.

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

Dated: Aug - 8 1996